Office-Supreme Court, U.S.
FILED
JUL 6 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 206

OCTOBER TERM, 1965

EVANS K. GRIFFING, WILLIAM P. BAIN, LESTER M. ALBERTSON, WILLIAM J. LEONARD, STEPHEN F. MESCHUTT, RALPH J. OSGOOD, CHARLES R. DOMINY, ROBERT J. FLYNN, ARTHUR M. CROMARTY, and THOMAS J. HARWOOD, Constituting the Board of Supervisors of Suffolk County, New York,

Appellants,

v.

I. WILLIAM BIANCHI, JR., and QUENTIN B. SAMMIS,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK

MOTION TO DISMISS

RICHARD C. CAHN,
425 New York Avenue,
Huntington, New York.

FREDERIC BLOCK,
Main Street & Maple Place,
Port Jefferson, New York,
Attorneys for Appellees.

Of Counsel:

CAHN & CAHN,
425 New York Avenue,
Huntington, New York.

TABLE OF CONTENTS

	PAGE
Jurisdiction	2
Statement	2
Questions Presented	2
Statute Involved	3
ARGUMENT:	
I—This appeal is not within the jurisdiction of the Court because not taken in conformity to statute	3
II—The Court should not allow appellants additional time to appeal to the United States Court of Appeals	7
(a) The question of jurisdiction has been obviously settled by prior decisions	7
(b) The dismissal of the appeal does not terminate the litigation	9
(c) No appeal lies to the Court of Appeals at this time	10
III—The appeal is not taken in conformity to the revised rules of the Court	11
Conclusion	12

Table of Cases

PAGE

American Insurance Co. v. Lucas, 314 U. S. 575 (1941) 4, 8

Public Service Commission v. Brashear Lines, 306 U. S. 204, 207 ..... 4, 9

Smith v. Wilson, 278 U. S. 388 (1927) 5, 6

Ex Parte Young, 209 U. S. 123 (1908) 5

Shenandoah Valley Broadcasting, Inc. v. American Society of Composers, Authors & Publishers, 375 U. S. 39, 994, 995 (1964) 5, 8

Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U. S. 88, 92 (1960) 5, 6

Moore v. Fidelity & Deposit Co., 272 U. S. 317, 321 (1926) 5, 6

Phillips v. United States, 312 U. S. 246, 251 (1940) .. 6

Oklahoma Gas & Electric Co. v. Oklahoma Packing Co., et al., 292 U. S. 386, 391 (1934) 6, 7, 8, 9

Rorick v. Board of Commissioners, 307 U. S. 208, 213 (1939) 8

United States v. New York, New Haven & Hartford Railroad Company, 276 F. 2d 525, 545 (2nd Cir., 1960) 8

Mottolese v. Petersen, 172 F. 2d 308 (2nd Cir., 1949) 10

Republic of China v. National City Bank of New York, 194 F. 2d 170 (2nd Cir., 1952) 10

Forgay v. Conrad, 6 How. 201, 203-206, 12 L. Ed. 404, 1848 11

Catlin v. United States, 324 U. S. 229, 236 (1945) 11

Beckhardt v. National Power & Light Co., 164 F. 2d 199, 2nd Cir., 1947) 11

Statutes

	PAGE
14th Amendment, U. S. Constitution	2
Section 153 County Law of the State of New York	2
Sections 201-208 of the Charter of Suffolk County, N. Y. (Laws of New York, 1958 c. 278)	2
28 U.S.C. Section 1253	3, 5, 8, 12
28 U.S.C. Section 1252	6
28 U.S.C. Section 1291	10
28 U.S.C. Section 1292	10
28 U.S.C. Sections 1343 (3), 1343(4), 2201-2202	2
42 U.S.C. Sections 1983 and 1988	2

Rules

Rule 12, Revised Rules of Supreme Court of the United States	12
Rule 13, Revised Rules of Supreme Court of the United States	11
Rule 16, Revised Rules of Supreme Court of the United States	1

Authorities

6 Moore, Federal Practice ¶ 54.05 (4), page 30, footnote 2	4, 10, 11
Note, The Three-Judge Court Reassessed (1963), 27 Yale L. J. 1646	5
Note, The Three—Judge District Court: Scope and Procedure Under Section 2281 (1963), 77 Harv. L. Rev. 299	5

IN THE

Supreme Court of the United States

October Term, 1965

No. 206

EVANS K. GRIFFING, WILLIAM P. BAIN, LESTER M. ALBERTSON, WILLIAM J. LEONARD, STEPHEN F. MESCHUTT, RALPH J. OSGOOD, CHARLES R. DOMINY, ROBERT J. FLYNN, ARTHUR M. CROMARTY, and THOMAS J. HARWOOD, Constituting the Board of Supervisors of Suffolk County, New York,

Appellants,

v.

I. WILLIAM BIANCHI, JR., and QUENTIN B. SAMMIS,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

MOTION TO DISMISS

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move for dismissal of this appeal on the ground that it is not within the jurisdiction of the Court, because not taken in conformity to statute or the Court's Rules.

Jurisdiction

This action was instituted pursuant to 42 U.S.C. Sections 1983 and 1988; 28 U.S.C. Sections 1343 (3) and 1343 (4); and 28 U.S.C. Sections 2201-2202.

Statement

Appellees sought a judgment declaring unconstitutional under the equal protection clause of the 14th Amendment Section 153 of the County Law of the State of New York and Sections 201-208 of the Charter of Suffolk County, N. Y. (Laws of New York, 1958, c. 278), which statutes embodied a state-wide practice whereby each member of the board of supervisors of each county of New York State* casts one vote regardless of the number of persons whom he represents.

Appellees also sought to enjoin enforcement of these statutes.

Questions Presented

1. Whether appellants have a direct right to appeal to the Court from an order of a three-judge district court which denied appellants' motion to dismiss the complaint; denied without prejudice to renewal appellees' application for an injunction; and retained jurisdiction, where appellees have not appealed from the denial of the injunction.

---

* The voting provisions of County Law Section 153 do not apply to counties within New York City or to a small number of other counties which have their own charters and have adopted a different basis of representation. (e.g., for many years, Nassau County has had a weighted vote upon its board of supervisors). The board of supervisors constitutes the legislative body of each county in New York State outside of New York City.

2. In the event that appellants have no direct right of appeal to the Court at this time, whether the Court in dismissing the appeal should allow appellants additional time to appeal to the United States Court of Appeals.

3. Whether this appeal has been taken in conformity to the Revised Rules of the Court, in light of the fact that the transcript of the hearing before the three-judge district court has not been filed.

Statute Involved

28 U.S.C. Section 1253:

> "1253. *Direct Appeals from Decisions of Three-Judge Courts.*
>
> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. June 25, 1948, c. 646, 62 Stat. 926."

ARGUMENT

I

This appeal is not within the jurisdiction of the Court because not taken in conformity to statute.

Although this appeal is taken pursuant to 28 U.S.C. Sec. 1253 (Jurisdictional Statement, pp. 2, 24a), it is not taken in conformity to statute because it is not an appeal from an order "granting or denying . . . an interlocutory or permanent injunction". The order below denied the injunction sought by appellees, but appellees have not ap-

pealed from the denial of their application for an injunction.

As stated in 6 Moore, Federal Practice, ¶ 54.05[4], page 30, footnote 2:

> "Only orders granting or denying an interlocutory or permanent injunction are directly appealable."

In *American Insurance Co.* v. *Lucas,* 314 U. S. 575 (1941), this Court held that the decrees below—

> ". . . are not decrees 'granting or denying' an injunction. Therefore direct appeals to this Court do not lie. § 266 of the Judicial Code, as amended, 28 U.S.C. § 380. See *Public Service Commission* v. *Brashear Lines,* 306 U. S. 204, 207, and *Phillips* v. *United States,* 312 U. S. 246, 248-251. The appeals are dismissed."

The *Brashear* case, *supra,* in directly applicable. There appellees brought suit to restrain enforcement by appellants of a Missouri statute. A temporary restraining order was issued, but after a hearing a three-judge district court denied appellees' request for a permanent injunction, dissolved the restraining order, and dismissed the complaint. A counter-claim interposed by appellants for an accounting of fees due to the state under the same statute was dismissed without prejudice, and the state officials appealed such dismissal. The Court dismissed the appeal, stating, 306 U. S. at 206-207:

> "The appellate jurisdiction of this Court on direct appeal from a final decree by a district court composed of three judges under § 266 of the Judicial Code is strictly limited as follows: 'a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit.'

The Public Service Commission as the successful party below has no standing to appeal from the decree denying the injunction. *New York Telephone Co.* v. *Maltbie,* 291 U. S. 645; *Lindheimer* v. *Illinois Telephone Co.,* 292 U. S. 151, 176. And as no appeal has been taken to review the decree denying the injunction, this Court is without jurisdiction."

In the present case, the three-judge court (1) denied appellants' motion to dismiss the complaint, (2) denied appellees' application for an injunction, without prejudice to renewal; and (3) retained jurisdiction. Appellants were the successful parties below insofar as the court denied appellees' request for an injunction, and have no standing to appeal from that part of the decree of the district court. And no appeal has been taken by appellees to review the denial of an injunction.

Appellants suggest that § 1253 be "regarded as having created a new legal right to appeal that is not governed by the usually applied principles of appealability . . ." (Jurisdictional Statement, p. 6). This suggestion is novel doctrine, completely unsupported by case precedent or statutory history.

To the contrary, the history of the three-judge statute and the direct appeal statute shows that a direct appeal was intended as a means of expediting final relief to a party aggrieved by the grant or denial of an injunction. Note, The Three-Judge Court Reassessed (1963), 72 Yale L. J. 1646. Note, The Three-Judge District Court: Scope and Procedure Under Section 2281 (1963), 77 Harv. L. Rev. 299; *Smith* v. *Wilson,* 273 U. S. 388 (1927); *Ex Parte Young,* 209 U. S. 123 (1908); *Shenandoah Valley Broadcasting, Inc.* v. *American Society of Composers, Authors & Publishers,* 375 U. S. 39 (1964); *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen,* 362 U. S. 88, 92 (1960); *Moore* v. *Fidelity & Deposit Co.,* 272 U. S. 317, 321 (1926).

The only other class of cases which Congress deemed sufficiently important to warrant a direct appeal were those in which an act of Congress has been invalidated on constitutional grounds and the United States is a party. 28 U.S.C. § 1252. No comparable provision has been made for cases in which state statutes have been invalidated, in the absence of an injunction.

In short, the direct appeal statute is—

> " not . . . a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such." *Phillips* v. *United States,* 312 U. S. 246, 251 (1940).

Moreover, the policy of Congress, as noted by the Court, has been to sharply limit its direct appeal jurisdiction from decrees of three-judge courts. Thus, in *Moore* v. *Fidelity & Deposit Co., supra,* the Court dismissed the appeal because no request for injunctive relief was pressed upon a three-judge court, although plaintiff could have pressed one. And in *Smith* v. *Wilson,* 273 U. S. 388, 390, the Court observed:

> "The general purpose of the Act of February 13, 1925, was to relieve this court by restricting the right to a review by it."

Congressional intent to restrict the Court's appellate review was also noted in *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co., et al.,* 292 U. S. 386, 391 (1934); *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen,* 362 U. S. 88, 94 (1960).

The Court's lack of jurisdiction in the present case has been well established for many years.

II

The Court should not allow appellants additional time to appeal to the United States Court of Appeals.

Citing *Oklahoma Gas & Electric Co., et al.* v. *Oklahoma Packing Co., et al,* 292 U. S. 386 (1934) as the leading case for the proposition that the Court may enter an appropriate order to preserve appellate remedies when an appeal from the district court has been wrongfully taken to the Supreme Court, appellants urge at the conclusion of their Jurisdictional Statement (p. 32) that such an order be made if the Court finds that it is without jurisdiction to hear this appeal.

While the appellees recognize the power of the Court to fashion appropriate relief to preserve the right of appeal from the judgment of a district court, the exercise of such power is not warranted under the present circumstances because—

(a) the question of jurisdiction has been obviously settled by prior decisions;

(b) the dismissal of the appeal does not terminate the litigation; and

(c) no appeal lies to the Court of Appeals at this time.

(a) The question of jurisdiction has been obviously settled by prior decisions.

The Court's attention is respectfully directed to the qualification established in the *Oklahoma Gas* case, *supra,* that such equitable power is only to be employed where the question of jurisdiction is not obviously settled by prior decisions.

> "We might now terminate the litigation by dismissing the appeal without more, and it would be proper to do so had the correct procedure under § 266 been more

definitely settled at the time the appeal to this Court was attempted." (292 U. S. 386, 392)

This qualification has been reaffirmed in many decisions subsequent to the *Oklahoma Gas* case and as recently as last term in the dissenting opinion of Mr. Justice Goldberg in *Shenandoah Valley Broadcasting, Inc.* v. *American Society of Composers, Authors & Publishers,* 375 U. S. 994, 995 (1964), where the rule was restated as follows:

> "The Court has frequently held in cases involving attempted direct appeals from three-judge District Courts to this Court that 'where the question of jurisdiction was not obviously settled by prior decisions', the Court will enter 'an order framed to save appellants their proper remedies.' *Phillips* v. *United States,* 312 U. S. 246, 254, 61 S. Ct. 480, 484, 85 L. Ed. 800. See also *Walling* v. *James V. Reuter, Inc.,* 321 U. S. 671, 676-678, 64 S. Ct. 826, 828-829, 88 L. Ed. 1001."

See also *Rorick* v. *Board of Commissioners,* 307 U. S. 208, 213 (1939); *United States* v. *New York, New Haven & Hartford Railroad Company,* 276 F. 2d 525, 545 (2nd Cir., 1960).

Unless the Court wishes to establish a doctrine of total permissiveness in allowing all appellants the option of first appealing to it from all decisions of three-judge courts, it should dismiss this appeal without granting appellants further relief. This appeal has been improvidently and frivolously taken to the Court under circumstances where the question of the Court's lack of jurisdiction has been obviously settled by prior decisions. If this is not a case for application of the qualifying rule of the *Oklahoma Gas* case, it is difficult to imagine one that would qualify.

The appellants are appealing from a three-judge district court decision which simply denies their motion to dismiss the complaint and retains jurisdiction pending further proceedings. In light of the express language, history and purpose of 28 U.S.C. section 1253 and *Ameri-*

can Insurance Co. v. *Lucas, supra,* and *Public Service Commission* v. *Brashear Lines, supra,* the appellants' contentions (Jurisdictional Statement, pp. 6-7) that (1) section 1253 grants the right to appeal, regardless of whether appellants have been aggrieved or an injunction has been granted; and (2) appellants nonetheless have properly appealed because the denial of the motion to dismiss coupled with the lower court's retention of jurisdiction is "equivalent to the grant of an injunction", are absurd. One suspects that appellants are attempting to make it appear that the question of the Court's jurisdiction has not previously been settled, when in fact that question has long been settled by prior decisions; and that appellants' motive is to make it appear that they have a colorable claim to an order allowing time to appeal to the Court of Appeals, when in fact they have no such claim.

(b) The dismissal of the appeal does not terminate the litigation.

There is another distinction drawn by the Court in the *Oklahoma Gas* case which totally militates against the grant of a savings order in the present case. There the dismissal of the appeal would have terminated the litigation:

> "We might now terminate the litigation by dismissing the appeal without more. . . ." (292 U. S. 386, 392)

Here the dismissal of the appeal will not terminate the litigation but will merely postpone presentation by appellants of their arguments to the Court. If the appellees at some future date renew their application to the Court below for an injunction, and an injunction is granted, all of the arguments now presented by appellants will be preserved for review here.

Under such circumstances no useful purpose would be served by adopting a savings order, and the appellees have found no comparable case which fashions such relief.

(c) No appeal lies to the Court of Appeals at this time.

Should this appeal be dismissed and an appropriate savings order entered, it would be to no avail, for no appeal lies to the Court of Appeals at this time. The appellants frankly admit, (Jurisdictional Statement, p. 6) that

> "Since the legal rationale behind the requirement that an appealable order be a final one is to avoid piecemeal litigation, it follows that the appropriate time to litigate the questions on their merits would be such time as the three-judge District Court is moved again to render a judgment on the merits."

28 U.S.C. section 1291 vests the Court of Appeals with jurisdiction of appeals from all final decisions of the district courts except where a direct appeal may be had in the Supreme Court, and Section 1292 vests the Court of Appeals with jurisdiction of interlocutory appeals only in certain bankruptcy, admiralty and patent cases and from orders granting or denying an injunction.

Moore states that "where the court in a civil suit, whether formerly at law or in equity, merely postpones or defers action by it for the time being", its order is not one granting or denying an injunction. 6 Moore, *op. cit. supra*, Sec. 54.07; pp. 47-48), citing *Mottolese* v. *Peterson*, 172 F. 2d 308 (2nd Cir., 1949); *Republic of China* v. *National City Bank of New York*, 194 F. 2d 170 (2nd Cir., 1952). This contrasts with appellants' claim (Jurisdictional Statement, p. 7), that

> "the Court's failure to grant Appellant's Motion to Dismiss the Complaint was, for all legal purposes, equivalent to the grant of an injunction by that Court."

While certain decisional exceptions have developed to the finality rule, such as the "offshoot rule" and the *Forgay* doctrine" (*Forgay* v. *Conrad*, 6 How. 201, 203-206, 12 L.

Ed. 404, 1848), none seem applicable to the present case. Rather the Court has before it a simple denial of a motion to dismiss coupled with retention of jurisdiction against the possibility that appellees may wish to press their rights at some later date.

In *Catlin* v. *United States,* 324 U. S. 229, 236 (1945), the Court stated:

> "But the denial of a motion to dismiss even when the motion is based upon jurisdictional grounds, is not immediately reviewable. Cf. *Roche* v. *Evaporated Milk Association,* 319 U. S. 21. See also *Dieckmann* v. *United States,* 88 F. 2d 902. Certainly, this is true whenever the question may be saved for disposition upon review of final judgment disposing of all issues involved in the litigation or in some other adequate manner."

Thus, where a district court simply denies a motion to dismiss (*Catlin* v. *United States, supra*); "merely postpones or defers action by it for the time being" (6 Moore, *op. cit. supra*), and retains "complete control of the cause." (*Beckhardt* v. *National Power & Light Co.,* 164 F. 2d 199, 2nd Cir., 1947), its order is not appealable to the Court of Appeals.

III

The appeal is not taken in conformity to the revised rules of the Court.

This appeal is not taken in conformity to the revised rules of the Court. Rule 13 (1) imposes upon appellants the duty "to docket the case and file the record thereof with the clerk of this court". Appellees are advised by the clerk of the Court that the transcript of the hearing upon the application for an injunction and upon the motion to dismiss, which hearing was held September 30, 1963, has

not been filed. 28 U.S.C. Section 1253 provides for direct appeals from decisions of three-judge courts rendered "after notice and hearing", and the transcript of such hearing is an essential part of the record. Moreover, appellants designated such transcript as a portion of the record to be prepared and transmitted to the Clerk of the Court (Notice of Appeal, Part II, subdivision 10, p. 2). Relying upon this designation by appellants of said transcript, appellees did not thereafter file or serve a cross-designation of additional portions of the record desired to be included, pursuant to Rule 12 of the revised rules of the Court.

CONCLUSION

The appeal should be dismissed. No order granting appellants additional time within which to appeal to the Court of Appeals should be granted.

Respectfully submitted,

RICHARD C. CAHN,
425 New York Avenue,
Huntington, New York.

FREDERIC BLOCK,
Main Street and Maple Place,
Port Jefferson, New York,

Attorneys for Appellees.

Of Counsel:

CAHN AND CAHN,
425 New York Avenue,
Huntington, New York.